

# LEGAL INFORMATION FACTSHEET



# INTRODUCTION

These legal information fact sheets are aimed at childminders and childcare providers. They form an introduction to some of the legal aspects associated with running a childcare business and the legal implications for the organisation and the law associated with various aspects of organisational development. They are not intended to be the sole solution to any legal problems that you may encounter.

If you require further and more in-depth legal advice then it should be sought from a legal or law centre or solicitor or lawyer.

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- Networks Online
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- Volunteer Centre Edinburgh.

These Legal Fact Sheets are aimed at all voluntary and community sector childcare provisions (childminders, nurseries and day care settings) operating within the London Borough of Islington. These fact sheets are an introduction to some of the necessary legal aspects of your business that you will need to consider.

## REGISTERING YOUR BUSINESS

In order to run a SLA within Islington your childminding, nursery or day care setting should be a registered charity.

### Why should you be a registered charity?

Being a registered charity shows that you take the work of your organisation seriously. It also shows that your organisation is governed and supported by key guidelines set out by the Charity Commission.

Some of the advantages to being a registered charity are:

- You are often able to raise funds from the public, grant-making trusts, local government and corporate businesses more easily than non-charitable bodies.
- You can formally represent and help to meet the needs of the community.
- You are able to give the public the assurance that you are being monitored and advised by the Charity Commission.

If you are not registered then you should register with the Charity Commission.

Their contact details are as follows:

**Website:** [www.charity-commission.gov.uk](http://www.charity-commission.gov.uk)

**Tel:** 0845 300 0218 (8am – 8pm weekdays, 9am – 1pm Saturdays)

**Fax:** 0151 703 1555

**Post:** Charity Commission Direct, PO Box 1227, Liverpool, L69 3UG

**London Office:** Harmsworth House, 13-15 Bouverie Street, London, EC4Y 8DP

In addition to being registered with the Charity Commission you also have to register your business with Ofsted.

A registered person is someone who is deemed qualified to care for children and has overall responsibility for ensuring that the requirements of the national standards are met. A company, committee or other group may be the registered person.

There are separate national standards for childminding and for full day care.

Details of these can be obtained from:

**Office for Standards in Education (Ofsted)**

**Website:** [www.ofsted.gov.uk](http://www.ofsted.gov.uk)

**Email:** [enquiries@ofsted.gov.uk](mailto:enquiries@ofsted.gov.uk)

**Tel:** 08456 404045 (education and local authority children’s services)

**Post:** Royal Exchange Buildings, St Ann’s Square, Manchester, M2 7LA

**Publication Enquiries:** 08456 404040

**Email:** [freepublications@ofsted.gov.uk](mailto:freepublications@ofsted.gov.uk)

**Children’s Information Service (CIS)**

**Tel:** 0207 527 5959. The helpline is open from 9am – 5pm

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# THE INCORPORATION PROCESS

## Terminology

As incorporation is, inevitably, a somewhat technical subject, it may first be helpful to clarify some of terms commonly encountered.

**Governing body.** This is the group of people who have legal responsibility for the management of an organisation and its resources (even though they may delegate much of that responsibility to others, for example staff). The governing body will usually be called by some other name, depending on the nature of the organisation. Common examples:

Type of organisation	Name commonly given to governing body
Unincorporated association	Management Committee
Trust	Board of Trustees
Club	The Committee
Company	Board of Directors
Charity	Board of Trustees
Community Benefit Society	The Committee

**Governing document.** The written set of rules that explain what the organisation exists to do, how it is structured, the basic rights of members, and important administrative details. Again, the title of this document will vary from one type of entity to another:

Type of organisation	Name commonly given to governing document
Unincorporated association	Constitution
Unincorporated trust	Trust Deed
Company limited by guarantee	Memorandum & Articles of Association (“mem and arts”)
Community benefit society	Registered Rules

**Companies and associations.** The four major types of legal form that may be adopted by voluntary and community organisations are as in the above table: i.e. the unincorporated **association**; the unincorporated **trust**; the **company limited by guarantee**; and the **community benefit society**. The first two are unincorporated; the latter two are incorporated.

For ease of reading in this document, and because they are the most common structures encountered, we shall refer to unincorporated organisations as “associations” and to incorporated organisations as “companies”, but these terms are to be taken as including the other options.

Note that **charitable status** is quite a different matter: any of these four types of body may also be registered as a charity, or not. Meanwhile all would-be charities must first adopt one of these four legal forms before seeking charitable status.

# Meaning of “incorporation”

**Incorporation** means the creation of a legal identity for an organisation which is separate from that of its members. In an unincorporated organisation, the law does not recognise any distinction between the organisation and the members of the governing body themselves. A corporate body, however, is considered as a person in its own right.

Incorporation is achieved by registering prescribed documentation with the appropriate government registry and paying a fee, followed by a regular annual fee to remain registered.

## Advantages of incorporation

### Liability

Members of the governing body of an unincorporated association have **unlimited liability** and usually that liability is **joint and several**. What that means is that should the organisation fail to meet its debts, those individuals may be required to meet them: and that burden may well fall on those most able to pay rather than on all members equally. (Having noted this, and scared everyone, it must be said that it is quite rare for management committees of voluntary organisations to be held personally liable for organisational debts – and a well-run organisation should not find itself in a position of having liabilities which it cannot meet.)

All members of a company, by contrast, are protected by **limited liability**. When they agree to join the company they commit themselves to paying a fixed sum in the event of the company being wound up with outstanding debts. This sum is usually a nominal £1.00 in a voluntary organisation.

There are occasions when company directors may be held personally liable for some or all of the debts of the company, but only where one or more members of the board have acted fraudulently or with gross irresponsibility. Generally the protection provided by incorporation is quite sound.

If a company is also a charity, then members of the management committee will not only be “company directors” but they will also be “charity trustees”. If trustees misuse charitable funds – even inadvertently – then individuals may on occasion be held personally liable to repay such misused funds back to the charity. Incorporation provides no protection against this specific liability.

### Ownership of property and entering into contracts

Because an unincorporated association does not technically exist in law as a separate entity, it stands to reason that it cannot own property or enter into contracts. Thus one or more members will usually have to own or contract on behalf of the association. This may be done deliberately – for example, by appointing certain people as **holding or custodian trustees** to own particular bits of property on behalf of the association – or it may happen by default in that the association acquires something without any clear specification of actual ownership. The law governing this area is very complex and problems regularly arise when, for example, it is discovered that all the holding trustees have died but they still technically own the building the organisation is now wanting to sell...

Difficulties can also arise in employment disputes when it may not be clear precisely who the employer is in law. A company, being a distinct legal entity, may own property and enter into contracts in its own right.

### Clarity of relationships

Generally the precise roles, rights and responsibilities of members and officers are clearer in a company than in an association. Corporate bodies are governed by reasonably comprehensive statutes (Acts of Parliament) while unincorporated bodies are governed by a complex hotchpotch of case law, specific statutes and – crucially – by the contents of their governing documents, which are often inadequate.

# Disadvantages of incorporation

## Cost

There are additional costs involved with being a company rather than an unincorporated body. There is the cost of getting registered (often several hundred pounds) plus an annual “filing fee” to remain on the register (£15 at time of writing). Historically, one of the main cost considerations, especially for smaller voluntary organisations, was the need to have a professional audit of the accounts each year. However, in recent years the regulations have been relaxed for smaller companies. With an annual turnover of less than £5.6 million, a professional audit is not required. Charities continue to need a full professional audit at a lower threshold than this and of course it will often be a condition of grant aid to provide audited accounts, regardless of company law or legal status.

## Jurisdiction

There are strict rules about the records which a company must keep and their form, and information which must be submitted to Companies House. Such discipline in record keeping need not be a bad thing in itself, and the task of administering a company is not all that onerous, but penalties can be stiff if records are not kept up to date. A voluntary organisation which does not have paid staff or a permanent office may find it particularly easy to fall foul of company law regulations. A key question to ask any organisation considering incorporation is: do you have the capacity to meet the administrative requirements?

## Privacy

The “price” paid for limited liability is loss of privacy. The Registry must be kept informed about directors, finances, indebtedness and so on, and this information is readily available to anyone who seeks it. However, especially in the case of a body receiving public funds, this may not seem such a bad thing.

# When to incorporate

There are no hard-and-fast rules as to when it becomes appropriate for an organisation to consider incorporation. In part it will depend on the motive for seeking corporate status.

If the primary aim is to **limit the liability** of the governing body, then the guide as to when to incorporate will be their degree of exposure: such factors as employing staff on a permanent basis, entering into contracts or engaging in speculative trading ventures will increase the potential liabilities of the governing body and thus tend to make incorporation more attractive.

Increasingly not-for-profit organisations are being encouraged to consider taking **loans** rather than seeking grants exclusively. Many lenders will only deal with corporate bodies; and members of an association’s governing body will be liable to repay a loan if their organisation defaults.

Incorporation may well be considered if a major piece of **property** (such as a building or lease) is to be purchased and it would be more desirable to have such property held by a corporate body than by custodian (or holding) trustees.

Groups sometimes opt for corporate status to demonstrate their **credibility**. The unincorporated forms are really quite informal in many ways; for example, an association can dissolve spontaneously simply if the governing body stops meeting, whereas a company must go through formal winding up procedures. The more regulated company structure can be reassuring to potential funders. Similarly, projects that have been part of some larger organisation and are now becoming independent may incorporate to demonstrate their autonomy and maturity.

Occasionally funders may insist upon a project becoming incorporated as a condition of grant aid or – especially – awarding a contract.

## When not to incorporate

The main reason for discouraging groups from incorporating is if they don't appear to have the capacity (whether in terms of volunteers, staff or premises) to keep up with the detailed administrative requirements of being a company.

Incorporation may also be inappropriate for a relatively short-term project.

It is also important to note that if an existing unincorporated body is insolvent (i.e. it cannot pay its debts), then incorporation will not protect the governing body from liabilities incurred prior to incorporation.

One alternative option exists for **registered charities**, which is for the charity itself to remain unincorporated (as an association or a trust) but for the governing body (board of trustees) to become incorporated. This enables them to hold land or property jointly, but does **not** provide limited liability.

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# INCORPORATION AS A COMPANY LIMITED BY GUARANTEE.

## What exactly is the process?

Many voluntary and community organisations start life as unincorporated associations. This is the most informal type of legal structure for non-profit activities and relatively easy to set up. The rules of the association will be spelled out in a governing document which is usually called the “constitution”, and most associations will have a membership that appoints a governing body often referred to as the “management committee”. (A few unincorporated organisations will be established as simple trusts, governed by a trust deed. Much of this Information Document will still apply to such trusts, though there will be a few differences in detail.)

An organisation that grows and progresses will usually at some stage decide to incorporate.

The most common incorporated legal form adopted is the company limited by guarantee, which is what this Information Document deals with. Less common, but sometimes a desirable option, is incorporation as a community benefit society under the Industrial & Provident Societies Acts. Once again, much of this Information Document will apply equally to such incorporation but with a few differences of detail.

## What is actually happening?

It is important to understand what is happening legally when you change your status from association to company. From the point of view of your members, it will appear that the project is simply re-structuring, but this is not in fact the case. Technically the company is a completely new organisation which is taking over the activities and assets (and liabilities) of the association, which will then usually be wound up. Once this is recognised, the actual steps involved should seem quite logical.

## The steps

The procedure for converting from an association into a company can be broken down into four main steps:

- (a) The decision to incorporate
- (b) Registering the company
- (c) Preparation for the transfer of activities, assets and liabilities
- (d) Completing the transfer and – usually – winding up the association.

### **(a) The decision to incorporate**

The proposal that the organisation should become incorporated is likely to have come from the management committee or from staff, perhaps on the basis of advice from a consultant or development worker. The management committee can start the process without reference to the membership; however, because at some stage the members will have to vote to transfer everything over to the new company, it is sensible for the management committee to ensure that the members are in favour of incorporating before spending time and money on the process.

Thus although it is not a legal requirement, it is recommended that the members are consulted to approve the proposal to become incorporated. This may be done through convening a special general meeting, or explanatory workshops at the AGM, or by some sort of postal consultation, or what have you, depending on the nature and size of the association's membership. Note that at this stage the membership should not be asked to agree the winding up of the association, as the new company won't yet be in place to receive its assets.

If your organisation receives ongoing funding, it would be diplomatic to discuss your plans to incorporate with funders, as they will have to switch the funding from the association to the company. This will only be a formality in most cases.

Before commencing the process of incorporation, make sure that your current constitution contains the appropriate powers and provisions for you to do this. For example, check the dissolution clause to ensure the new company will be eligible to receive residual assets if the association is wound up. If your constitution does not contain the necessary provisions, it should normally be possible to amend it accordingly prior to incorporating.

### **(b) Formation of the company**

This must be done before a formal decision is made to wind up the association, otherwise there will be nothing to transfer the association's assets and activities to.

The process itself is straightforward: obtain suitable memorandum and articles of association ("mem and arts", the new company's constitution), have the first members and first directors of the company sign up the relevant forms, and submit the whole lot to Companies House. The tricky bit is getting the right set of mem and arts to suit your particular project. Many who offer a company registration service will simply provide a stock set of mem and arts with minimal tailoring for your particular requirements. Many groups planning to incorporate borrow mem and arts from another organisation and again make minimal changes. Shop around and try to make sure you get the company you actually want, rather than one that someone wants to sell you, or one that happened to suit some other project. And make sure the end product complies with company law.

It is not necessary for all current members of the association to become founder members of the company, and often this is not desirable because of the delay in getting lots of signatures on forms. Commonly, members of the association's management committee will form the company: sometimes all of them, but it is possible for only a couple of members to establish the company and this will often make life easier. Additional members can be admitted after the company is registered.

Once Companies House has issued a Certificate of Incorporation, the company exists and can start to accumulate assets. The company should open a bank account in its own name, ready to receive any money which is to be handed over during the transfer – it cannot just take over the association's existing account.

If your association is also a registered charity, it will be necessary to acquire charitable status for the company before proceeding with the following two steps. The Charity Commission will not transfer an existing charity registration from an association to a company: the company must re-apply and obtain its own unique charity number. There is a fast-track registration process for charities undergoing incorporation, using an application form APP2.

### **(c) Preparation for the transfer**

There are three main steps in preparing for the transfer:

- (i) identify every item of property owned by the association (or held by trustees on behalf of the association) and every contract held by the association;
- (ii) consider how each item or contract is to be transferred to the company, and reach an agreement with anyone who needs to consent to the change (particularly the other party to any contracts held);
- (iii) prepare a written Transfer Agreement between the association and the company which specifies that all property and contracts will be transferred to the company and, in return, the company will discharge any obligations of the association (i.e. pay outstanding debts etc.)

You may wish to employ a solicitor to write the Transfer Agreement, depending on how complex it looks like being, but a small organisation with few assets or contractual liabilities should be able to deal with this themselves. Generally it should contain the following provisions:-

- That the association will transfer its activities to the company and the company will continue these activities.
- That from the Transfer Date (usually an unspecified date in the future) the company shall undertake and perform all contractual obligations of the association.
- That on the Transfer Date the association shall deliver to the company all its cash and assets and shall assign all contracts and debts to the company.
- That the company does not have to pay anything for the transferred property.
- That the company has agreed to accept the property of the association on the terms stated.
- That all necessary consents have been acquired from third parties such as insurers, other contract holders, funders, the Charity Commission, etc, as appropriate.
- That any employees of the association will be employed by the company under the same terms and conditions and that their employment shall be treated as continuous from when they started working for the association.
- That the association appoints the company as its agent to collect in outstanding debts and discharge outstanding obligations.
- That the company's mem and arts have been approved by the association or by its management committee.
- That all members of the association at the time of transfer will be accepted as members of the company if they apply.
- That the company has no members who are not also members of the association.
- That the company indemnifies members of the management committee of the association against any liabilities which may arise from actions taken prior to incorporation, except for any which may arise as a result of fraud or gross negligence on any individual's part.
- That the association shall do everything it can to ensure that the company obtains the full benefit of the agreement.

## **(d) Completing the transfer and winding up the association**

Once this has all been sorted out and a Transfer Date set, the company (which may still only have a few members) must hold a meeting to agree to the terms of the Transfer Agreement.

The association then calls a special general meeting in accordance with its constitution, sending all members: (i) a copy of the Transfer Agreement; (ii) a copy of the company's mem and arts; (iii) the wording of the resolution to agree to the transfer and, usually, to wind up the association (see below). All being well this meeting should agree that the Transfer Agreement be signed on behalf of the association, agree the Transfer Date, and agree that the association be wound up immediately after the Transfer Agreement has been effected.

In a few cases, it may not be advisable to wind up the original association after the transfer has been completed, but to keep it in existence as a dormant organisation with perhaps a few pounds in the bank. This is normally only appropriate in the case of an organisation (generally a charity) where there is a possibility that someone may have already left something in their will to the association, but is still living. The law will not automatically see the new company as the successor to the association if the latter has been dissolved, so the bequest could be lost. However, if there is little or no possibility of this being the case, then it is usual to wind up the unincorporated association once everything has been transferred to the company.

On the Transfer Date representatives of the association and of the company (and not the same people acting on behalf of both bodies) should get together and confirm that all the conditions of the Transfer Agreement have been met. The Transfer Agreement is then signed along with any other documents which are required (such as the company signing leases). The association hands over assets where practical, such as a cheque for the total amount held in the association's bank accounts.

An audit should be arranged of the accounts up to the Transfer Date so that the company knows exactly where it stands with regard to cash in hand, value of assets, outstanding debts etc. This is effectively a closing audit of the association and so may be undertaken in accordance with the provisions of the association's constitution rather than those of the company's mem and arts.

Once all financial and contractual matters have been sorted out, the association closes its bank accounts and ceases to function, unless it has been decided to maintain it in a dormant state as explained above.

## **After the transfer**

All interested parties should be informed that the transfer has been completed; this includes funders, insurers, Inland Revenue, HM Customs & Excise (if the association was registered for VAT) etc. If the organisation is a registered charity, the Charity Commission will want to see the minutes of the final meeting of the association that agreed to the transfer of the assets to the new company.

The company must ensure that all its statutory requirements are met: a nameplate outside its registered office, stationery which complies with company law and so on.

The company secretary should ensure that all the people appointed as directors of the company are properly registered at Companies House (using form 288) and – if appropriate – contact all members of the association to invite them to apply for membership of the company. It should not be necessary to hold a general meeting of the company straight away; the company can carry on the same sort of annual cycle as the association with regard to financial year end, timing of Annual General Meeting and such like.

# GOVERNANCE ISSUES

Governance is about putting in place effective arrangements for developing and then managing and running your business. It is the responsibility of your management committee and staff members to ensure that quality systems and processes are in place and in accordance with Ofsted and the national standards.

They also have overall accountability for the organisation and any grants that are administered to the business. They take the lead for the strategic and financial direction of the business.

## Roles and Responsibilities of Trustees

There's a critical need for committee members to have regular detailed information about the business. This allows them to manage and make decisions effectively, based on facts. It's the shared responsibility of both the committee members and the staff to communicate and manage information to ensure business success.

### To do this:

- Committee members and staff should be aware of what's expected from them and what their key responsibilities are with regard to collection, presentation and analysis of business performance information. For example...
  - Who is responsible for analysing past and future occupancy levels and who collates that information?
  - Who collates the cash flow forecast and who analyses it and makes decisions based on the cash situation?
- An up-to-date information pack should be supplied to all new committee members on their appointment. This could contain a brief history of the business together with a summary of the business plan and regular reporting documents.
- The supervisor should send weekly or monthly business updates of key information to the committee and not wait for the next committee meeting, so that problems can be seen regularly and action taken immediately.
- Regular full committee meetings should be held at which the supervisor should be present. A formal agenda should be used based on the important business information. At the conclusion of the meeting clear actions should be delegated.
- The business finances should always be open to all, visible and easily understood.
- Committee members should have access to all major policies and key information documents.

Committees are a vital part of many organisations, especially those in the voluntary or community sector. Day-to-day communications between committee members may be time consuming and difficult to organise, but implementing the above points can be of great benefit to the service provided to children.

### Further governance information can be obtained from the following source:

The Code of Governance for the Voluntary and Community Sector has been published by the National Governance Hub (a partnership of organisations working to improve governance of charities and other voluntary and community organisations).

The code is based on seven key principles that have been designed to apply to any charity:

- Board leadership
- The Board in control
- The high performance Board
- Board review and renewal
- Board delegation
- Board and trustee integrity
- Board openness

You can download copies of the code from [www.governancehub.org.uk](http://www.governancehub.org.uk). There is also a summary version of the code, and a leaflet called Learning to Fly (for local voluntary and community organisations).

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# RECRUITING TRUSTEES

Recruiting to a trustee position is increasingly difficult because as the third sector becomes more professional specific skills are increasingly needed, for example legal, finance and fundraising. However, the same applies to such areas as business and strategic planning, human resources, stakeholder management and many more.

We like to think that people are entirely altruistic and will give their time/money/skills/resources out of the goodness of their heart. However, reality is that many people do expect something in return, even for a voluntary post. This could be, for example, training and development, having something to enhance a CV, to “fill” a period of unemployment, to learn new skills, enhance other career prospects, or simply an opportunity to network effectively.

At the same time, potential and existing trustees are becoming increasingly wary of their legal liabilities as the voluntary sector is becoming a more litigious sector, beset by more stringent legal policies and responsibilities (Human Resources, equal opportunities, protection of vulnerable groups, industrial tribunals, etc).

## Routes to getting support

Most voluntary sector organisations have difficulty in recruiting trustees. Set out below are a variety of avenues to go down when looking for more trustees. The important point to identify in advance of any recruitment process is the sort of skills you are looking for so that, when you go out to recruit, you can define the person you are seeking rather than just wanting more trustees:

National Council for Voluntary Organisations – Trustee and Governance Team.

NCVO's Trustee and Governance Team provide various services including training and workshops, a range of publications and information as well as advice sessions and consultancy. The website, [www.askncvo.org.uk](http://www.askncvo.org.uk) also has a wealth of advice on recruiting and supporting board members in their Trustee & Governance section.

Good Practice in Trustee Recruitment

<http://www.ncvo-vol.org.uk/publications/publication.asp?id=3846>

How to Recruit the Right Trustees

<http://www.ncvo-vol.org.uk/vsmagazine/features/?id=3544>

Trustee Bank – [www.trusteebank.org.uk](http://www.trusteebank.org.uk)

NCVO's Online Trustee Bank is also a directory of organisations providing help in recruiting trustees, national and local and can be accessed via their website. All services listed in the Trustee Bank offer a pool of individuals who are interested in becoming trustees. All the organisations that are listed provide different services. Some will match up vacancies with a list of their members who are interested in becoming a trustee; some will provide interviewing and selection; some only recruit in certain geographical areas or for certain types of organisation. The hotline number is 0800 2798 798 or their switchboard 020 7713 6161 and ask to speak to the Trustee & Governance Team.

The Governance Hub – [www.governancehub.org.uk](http://www.governancehub.org.uk). The Governance Hub is one of six National hubs of expertise for the voluntary and community sector. Go to their website, for invaluable information on trustee recruitment and for many useful free downloads including 10 step recruitment toolkit: Recruit a Trustee Pocket Guide from the Governance Hub: <http://admin.governancehub.org.uk/ClientServerAPI/GetFile.ashx?table=Documents&objectID=c9f11978-4202-469d-9f24-766da90545a2&column=File>

Governance Hub Resources: <http://www.governancehub.org.uk/Home/Resource%20Finder/Hub%20resources.shtml?objectID=6ba42f31-1625-4039-91a1-374e751a68f1>

Volunteer Bureau and Councils for Voluntary Services. A number offer a trustee brokerage service, so it might be worth contacting your local volunteer bureau to see if they can help. In addition, some local Councils for Voluntary Services may hold local registers and can also provide support, advice and information for local voluntary groups.

NAVCA (National Association for Voluntary and Community Action), (formally NACVS – National Association of Councils for Voluntary Service) can be contacted on 0114 278 6636, e-mail [navca@navca.org.uk](mailto:navca@navca.org.uk).

Their website address is [www.navca.org.uk](http://www.navca.org.uk).

Volunteering England - [www.volunteering.org.uk](http://www.volunteering.org.uk)

Volunteering England is the new national volunteer development agency for England. Formed through the merger of the National Centre for Volunteering, Volunteer Development England and the Consortium on Opportunities for Volunteering. They can be contacted on 0845 305 6979, by email on [information@volunteeringengland.org](mailto:information@volunteeringengland.org) or through their website.

## Advertising for Trustees

Some organisations have had success in finding trustees through advertisements in the Guardian, The Times and also in regional newspapers and third sector newsletters and websites.

Sources of advertising include:

Third Sector: [www.thirdsector.co.uk](http://www.thirdsector.co.uk)

Volnet: <http://www.volnet.co.uk>

Volresource: <http://www.volresource.org.uk>

VolResource aims to make it quick and easy to get to useful information on anything to do with running a voluntary organisation (whether a community group, charity or other non-profit body).

Voluntary Sector National Training Organisation (VSNTO)

Address: <http://www.vsnto.org.uk/>

The VSNTO represents the interests of the voluntary sector in the areas of staff, volunteer and trustee training and development.

Look for "pathways" where the initiative can be disseminated through communities, by conference leafleting, word of mouth, e-mail, etc. Remember, public libraries are good places and will promote charities free of charge.

Consider talking to your local radio station (sometimes they have a Community Action Desk), or Community Radio Station (try [www.listenlive.eu/uk.html](http://www.listenlive.eu/uk.html)) to see if they could promote the post, or even run a "feature" on community involvement and the need for trustees, culminating in a request for volunteers to contact you?

Volunteering Sites:

<http://www.do-it.org.uk>

<http://www.navb.org.uk/>

<http://www.worldvolunteerweb.org/>

<http://www.volunteering.org.uk/>

<http://www.volunteerscotland.info/index.php>

There is now a plethora of recruitment websites where charities can advertise their vacancies for little or no cost.

Charityjob: [www.charityjob.co.uk](http://www.charityjob.co.uk)

Charityjob currently works in partnership with 550 UK charities and 8 leading specialist recruitment agencies to provide a service to the voluntary sector. CharityJob offers substantial discounts if the charity concerned agrees to a link from their website to Charityjob. To obtain more information telephone: 020 8390 1177 or email [info@charityjob.co.uk](mailto:info@charityjob.co.uk)

Charity People: [www.charitypeople.com](http://www.charitypeople.com)

Charity People have actively promoted the concept of trusteeship through their website. Charity People offers not-for-profit organisations the opportunity to advertise their vacancies on [www.charitypeople.com](http://www.charitypeople.com). More information, including costs, can be obtained by telephoning 020 3043 8764.

Council for Ethnic Minority Voluntary Organisations:

[www.emf-cemvo.co.uk](http://www.emf-cemvo.co.uk)

Advertising in the publications which target black and ethnic minority readers or readers with a disability is a good way to reach those audiences. CEMVO operates a trustee placement scheme, which aims to assist charitable and voluntary organisations who want to create a more diverse Board. Until January 2003 they did not charge for their service. Further information can be obtained by telephoning CEMVO on 020 8432 0000 or email [enquiries@emf-cemvo.co.uk](mailto:enquiries@emf-cemvo.co.uk)

## Use your Networking Skills

Voluntary sector organisations can be pretty bad at promoting what they do. Make it clear that you are looking for specific skills at your events, that a volunteer might like to be involved with the values that your organisation has, and above make clear the role and duties of the trustee (don't assume that everyone knows what a trustee does!). (Similarly, schools are desperately short of school governors but few people know what they actually do and what skills they need). When speaking to representatives of other organisations, particularly those in a similar field of activity to one's own, it is worth asking if any of their trustees are coming to the end of their term of office and whether they are likely to be seeking new trusteeships.

Online national trustee recruitment service

A number of organisations listed on NCVO's Trustee Bank ([www.askncvo.org.uk](http://www.askncvo.org.uk)) offer an online service, currently a relatively new form of recruitment enabling trustee opportunities to be publicised on the internet.

- Common Purpose ([www.justdosomething.net](http://www.justdosomething.net))
- Business Community Connections ([www.bcconnections.org.uk](http://www.bcconnections.org.uk))
- Do-it.org.uk ([www.do-it.org.uk](http://www.do-it.org.uk))

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# WHAT DO YOU REALLY NEED YOUR TRUSTEE TO DO?

As mentioned above, it is important when seeking new trustees to be clear what skills you wish them to have, and to be able to provide the requisite information about the organisation, as well as details about the board/management committee's structure, and the frequency and venue and timing of meetings. A role description should be provided also. A role description for a trustee can be obtained from both ACEVO on 0845 345 8481, e-mail [info@acevo.org.uk](mailto:info@acevo.org.uk), [www.acevo.org.uk](http://www.acevo.org.uk) and NCVO). Further information on inducting and supporting trustees can be obtained from NCVO.

You might look at doing a training need analysis to put together the description for the role. The following list outlines skills and personal details which are to be rated either for Trustee experience, understanding or training need:

- Equal opportunities & diversity
- Event organisation
- Financial management
- Fundraising & sponsorship
- Governance & regulation
- Health & safety
- ICT strategy
- Knowledge of local community
- Knowledge of voluntary sector
- Managing premises
- Marketing & PR
- Mentoring
- Monitoring & evaluation
- Networking
- Partnership working
- Personnel management
- Policy & research
- Project management
- Risk management
- Target setting
- Volunteer management

If you decide to adopt this approach, then recruitment is much the same as for a paid post – produce a job description and person specification, word your advert, choose your media, go through a selection process and make sure an induction plan is in place.... and so on.

## Charity Commission

A report on Trustee recruitment, selection and induction has been published by the Charity Commission and is available on their website and may provide some useful background reading: <http://www.charitycommission.gov.uk/publications/report1.asp>

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# PAYMENT OF VOLUNTEER EXPENSES

Paying expenses to volunteers is common practice for many organisations. For others however, expense payments are apparently out of scope due to funding restrictions. Some organisations, even major nationals, pay expenses but risk falling foul of legislation. This is a brief guide to best practice in paying volunteers expenses.

## Key Points

- Only reimburse volunteers for expenses actually incurred in the course of their volunteering.
- If you can't afford volunteer expenses now, cost them into future funding applications, or consider applying for a small grant specifically to cover expenses.
- Ensure adequate record keeping of expense payments. This is evidence for funders, and it covers your volunteers' backs in the case of Benefits Agency or Tax enquiries.

## Why Pay Expenses?

In order to include people on low incomes. Paying expenses can also be a way of increasing a volunteer's sense of being a part of the organisation. And if a volunteer doesn't want to accept the expense payments, get them to claim their expenses and donate them back to the organisation. It is well worth setting up a system for this that keeps the process simple.

## What Should we Pay?

The mantra for this fact sheet is **only reimburse actual expenses**. If you give volunteers extra cash, or set amounts that don't reflect actual costs, you are seriously at risk of falling foul of minimum wage legislation. This also puts volunteers' benefits at risk and can leave them liable for taxation.

### Reasonable expenses include:

- Travel to and from the place of volunteering
- Travel in the course of volunteering
- Childcare
- Food and refreshments while volunteering
- Postage, telephone calls etc. paid for by volunteer
- Cost of equipment, protective clothing etc.
- Attendance at training events and courses
- Travel

**Environmental considerations:** Out of kindness to the environment many organisations encourage their volunteers to use public transport, their legs, or a bicycle to get to their voluntary work. For them car use is absolutely the last option, unless it is for safety reasons (getting home in the dark), for reasons of disability, distance, or lack of availability of alternative transport. Some County Councils do have an environmental policy that encourages staff and volunteers to use environmentally positive means of transport.

**Walkers:** At present there is no tax free mileage rate on shoe leather, so you shouldn't pay people expenses for walking to work.

**Cyclists:** We recommend paying volunteers who cycle to their voluntary work the 20p a mile tax free mileage rate.

**Public Transport Users:** Travel by train and bus to the place of work, or in the course of voluntary work, should be remunerated wherever possible. Organisers on limited budgets may want to impose limits on the extent of these payments.

**People with Disabilities:** We recommend paying for taxis for people with disabilities. Volunteers using taxis should not be expected to use their Taxi Card in order to get to/in the course of their voluntary work.

**Mileage Rates:** Tax free mileage rates 2006 - 2007 (pence/mile):

	<b>first 10,000 miles in tax year</b>	<b>&gt; 10,000 miles in tax year</b>
Cars / Vans: Regardless of engine size	40	25
Motorcycles	24	24
Bicycles	20	20

## Food

It is reasonable to reimburse volunteers for the cost of meals / refreshments they have while doing their voluntary work. The amount should be the actual cost of their meal; though it is common practice to set an upper limit. Many organisations choose only to offer meals to volunteers who are doing four hours or more voluntary work at any one time.

## Childcare

Childcare can be an expensive business. But it is increasingly recognised by funders and volunteer organisers as something worth paying for: Melanie Nairn, of the Edinburgh Rape Crisis Centre, puts it like this:

**The provision of childcare was completely necessary for me to be an unpaid worker. When working with women especially, it is essential to have some kind of childcare provision for volunteers..... we find that what works best for us and our volunteers is to provide childcare expenses. This allows workers to choose the childcare that suits them and their children best. If we were not able to provide those expenses it would be virtually impossible to recruit women as our volunteers.**

Not paying expenses for childcare can clearly constitute a barrier to volunteering for anyone with young children. If paying cash and letting the volunteers arrange their own provision proves impossibly expensive, consider sharing crèche facilities with other organisations, or pairing up volunteers with childcare responsibilities. If you are still unable to provide any childcare now think about introducing it in the future.

## Note of Warning

Paying a 'flat rate', or over the odds for a volunteer's expenses could leave them liable to taxation. Similarly, it could jeopardise a volunteer's welfare benefits. Asylum seekers are also affected, with strict Home Office guidelines warning that anything beyond remuneration for actual expenses will be construed as payment for (illegal) work.

Recent cases have found that flat rates can constitute a wage – a wage which is below the level of the minimum wage. In this situation the organisation would be liable to pay the volunteer for all the time worked, up to the level of the minimum wage.

As volunteering has become more formalised, the grey area between employment status and volunteer status has increased. Much speculation is the result of a couple of cases which decided that volunteers had employee status in the eyes of the law. Employee rights include the minimum wage, rights against discrimination and unfair dismissal, rights to maternity leave, sick leave and holidays. Although it is clearly good practice to avoid discrimination and to treat volunteers fairly, this does not make it desirable that the distinction between employees and volunteers should be blurred.

Volunteering is a form of contribution distinct from employment – volunteers are not under the same obligations or responsibilities as employees, it is a more flexible arrangement and they need to be managed in a different way to staff. Keeping this clear for everyone makes it less likely your organisation will be unexpectedly met with the liabilities which go hand in hand with employee status i.e. liability for unfair dismissal or discrimination claims, or for payment of the national minimum wage.

This information sheet considers the differences between volunteering and employment, noting a few cases which have been decided in the past. The majority of volunteering is quite clear cut: someone giving of their time – maybe a couple of hours a week – and expecting nothing in return. The judgments in the cases where an individual has successfully argued they have employment status are not at all surprising when you look at the unusual arrangements in place. It is these sorts of unusual arrangements which organisations need to be careful don't arise if they are not intended.

Unfortunately, it is not possible to come up with a checklist of points, which, if followed, will absolutely guarantee that a person will not be considered an employee. The difficulty for organisations is that the main guidelines are contained in decisions made at employment tribunals where no two cases will have the same facts. These decisions have been few and sometimes inconsistent. Having said this, the situation has now been made somewhat clearer by an Employment Appeal Tribunal decision, *South East Sheffield Citizen's Advice Bureau v Grayson* [2004] IRLR 353. The Employment Appeal Tribunal set out what amounts to a robust defence of the concept of volunteering as a distinct, freely entered into relationship held by the majority of volunteer involving organisations.

However, volunteering is, as is always quoted, 'a two way process'. Doing something in return for something is the basis of a contract – the issue is in what circumstances this could become an employment contract. There is no legal definition of volunteering. The National Minimum Wage Act defines a 'voluntary worker' but according to the Dept of Trade and Industry, 'the intention is not for the voluntary workers exemption to be used as a precedent for defining volunteering'.

Source

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# DEFINING EMPLOYMENT VERSUS VOLUNTEERING

In order to be employed, there needs to be a contract, and then it needs to be shown that it is an employment contract.

The key legal ideas in defining a contract are 'agreement', 'consideration' and 'intention'. A contract does not have to be written, and money does not necessarily have to be paid.

When looking at whether someone is employed under an employment contract, an Employment Tribunal will look at the whole situation, rather than looking at isolated facts. This, of course, makes the question of whether or not someone is employed harder to determine. It is crucial then, that a voluntary organisation looks at the whole situation concerning the role of volunteers in the organisation.

One way to think about it is to consider whether there is mutuality of obligation between the organisation and the volunteer. In a true volunteering situation there is no legal obligation on the part of the volunteer to do the work, nor is there an obligation for the organisation to offer work. I.e. there is no legally enforceable employment contract.

**'Intention'** – Was it intended that an employment situation be created? Things which might count here are whether other people do the same tasks and have similar responsibilities but are employed. Is the voluntary work intended to lead on to paid work? If so, is there a clear change between volunteering and employment? How does the wording and formality of your volunteering agreements compare with your staff contracts? The onus is on the party trying to avoid a contract to show that there is no intention to create one (as noted in *Alexander v. Romania at Heart*).

**'Consideration'** is the exchange of something of value between the volunteer and the organisation. Usually, in an employment contract this is wages, but it could be other things such as training or 'perks'. Are regular payments given that are above out of pocket expenses? Just labelling the money as expenses can't disguise the reality of a salary being paid (*Migrant Advisory Service v. Chaudri*). It is often a question of degree when deciding whether training and perks amount to consideration. In *Gradwell v. Council for Voluntary Service Blackpool, Wyre & Fylde* training was held not to amount to consideration. However, in *Armitage v. Relate*, training was decided to be consideration, partly because the volunteer had to repay the costs of training if they left.

## Keeping the Differences Clear

In avoiding an employment situation arising, it is important to think clearly about the difference between your staff and your volunteers. Much good practice in involving volunteers is based on employment practice – such as equal opportunities, complaints procedure or having a written description of tasks. Staff procedures are a good starting point but need to be adapted with the role of the volunteer in mind. They need to be less formal than personnel policies but formal enough to ensure clarity e.g. Volunteer Agreements, Volunteer tasks lists, Equal Opportunities Policy and Complaints Procedures.

## Payments

The safest system is to make payments on receipts only, and it is a good idea to keep receipts and records of money paid out in case there are queries. No-one should be out of pocket for volunteering. Rewards, presents and one-off payments, such as 'honoraria' can be problematic if it can be shown that there was an expectation that the volunteer would receive something for their work. An honorarium is only acceptable if it is both totally unexpected and there is no precedent surrounding it. Otherwise it is taxable and could give the volunteer employee status. There is also a danger of creating bad feelings amongst those volunteers who don't receive them. It is best to be wary about paying honoraria, instead you could always invest in making volunteering roles more rewarding by offering better training (see below), more social activities, extra resources or outings to say thank-you.

## Volunteer Agreements

It is important to have a volunteer agreement, while making clear that this serves to clarify what the volunteer and organisation will be doing and does not imply an employment contract. They ought to be less formalised using language such as 'expect' and 'hope' instead of 'must' and 'will'. A voluntary work outline is also a useful document that needn't be avoided for fear of creeping towards an employment arrangement.

## Perks

Avoiding 'consideration', does not mean stopping all support for your volunteers. It is important to make volunteers feel valued by offering 'thank yous' such as Christmas lunches, or social evenings. Where it becomes difficult, is when these perks become expected, regular, of increased 'money' value.

## Training

It is also appropriate for people to use volunteering as a means of extending their skills through benefiting from training related to their volunteering. However, do be careful, as it might become 'consideration' if training is not related to the volunteering and is seen as something given in exchange for the work done e.g. paying for computer training if this isn't used for the work done.

## The National Minimum Wage

The National Minimum Wage Act 1998 (as amended) excludes "voluntary workers" (section 44). To ensure volunteers are kept outside the scope of the Act, the key points to remember are:

- Pay expenses on receipts or a flat rate as near as possible to the genuine amount (as was done in *Gradwell v. Council for Voluntary Service Blackpool, Wyre & Fylde*).
- Training given should be related to the job done.
- Provision of subsistence is OK if the need arises from doing the voluntary work, but where this is made as a money payment, it should not include money for accommodation. (section 44(4))
- Consider any other perks or benefits given to volunteers carefully as these could begin to edge a volunteer towards possible employee status.

# The Whole Picture

It is the combination of factors which matters rather than any single factor in isolation. So, if the arrangements for your volunteers fall into any of the difficult areas mentioned in this fact sheet, you should think through how to make the distinction between volunteers and employees clearer. It should be thought of as a scale with volunteering for no benefit at one end and waged employment at the other. Volunteering is a two way process – volunteers need to get something out of their experience of volunteering – but this need not make them employees. Having said this, it is important that organisations do not cut back on the support they give to volunteers unnecessarily because they fear it will constitute an employment contract.

## Further Information

The National Minimum Wage Act 1998 Ch.39 section 44

Bowgett, Kate et al. 'Expenses, Benefits and the National Minimum Wage' in The Good Practice Guide (2002, 2nd edition), The National Centre for Volunteering (pp.106-113)

Volunteering England, Managing Volunteers: Appeal tribunal clarifies volunteering relationship <http://www.volunteering.org.uk/missions.php?id=823>

Volunteering England, Managing Volunteers: National Minimum Wage and Expenses <http://www.volunteering.org.uk/missions.php?id=432>

The Cases:

### **Armitage v. Relate 1994, Folio 9/272/037**

Mrs Armitage was a volunteer counsellor who an Industrial Tribunal decided was an employee. Volunteers had to agree to undertake a minimum 600 hours counselling or repay the cost of the training they had received. After three years, counsellors could become paid employees or have some sessional paid work. The obligation to repay the costs of training and the requirement to work 600 hours constituted "employment" for the purpose of bringing a claim under the Race Relations Act 1976. It was noted that 'if Relate Cleveland wanted to they could sue a counsellor under the terms of the agreement to recover losses sustained in training expenses.'

### **Alexander v. Romania at Heart, 1997, Folio 14:142:44**

Mrs Alexander ran a charity shop for three years with managerial and financial responsibilities. She had a job description, was paid expenses and received training. Although training could amount to consideration, because the organisation had no obligation to provide it, it did not count. The skills which Mrs Alexander learned simply accrued to her and were not supplied as a benefit to her by the shop. Therefore she was not an employee.

### **Migrant Advisory Service v. Chaudri, 1998, EAT/1400/97**

Over three years Mrs Chaudri was paid £25 per week which was raised to £40 per week for doing administrative work four mornings a week. This was despite her having no expenses, such as lunch or travel. She was also paid when she was off sick or on holiday. It was decided that the money given to her counted as wages, as it was a regular amount which was not related to any expenses incurred. This was 'consideration' and meant she was employed.

### **Gradwell v. Council for Voluntary Service Blackpool, Wyre & Fylde, 1997 Case No: 2404314/97**

Volunteers signed a volunteer agreement. Other than attending training and a meeting once a month, there were no set minimum hours. They were paid actual expenses only. It was decided that neither payment of genuine expenses or providing the training amounted to consideration.

## Volunteering and Welfare Benefits

Claimants of welfare benefits such as Jobseekers Allowance, Income Support, Incapacity Benefit and Disability Living Allowance are entitled to volunteer without losing their benefits. There are some important provisos though, which potential volunteers should be aware of before going ahead with their voluntary work.

### What qualifies as voluntary work?

This is work undertaken without payment. This can be helping out a neighbour, or volunteering with a not-for-profit organisation. The work should not be something that an organisation should have paid you to do, nor should it be for a close relative.

### How much voluntary work can you do?

As much as you like. If you're claiming Job Seekers Allowance though, you still need to be actively seeking, and available for work.

### Claiming expenses vs. being paid

Volunteers should not be out of pocket for the contribution they make to the community, so they can usually claim expenses. These can cover the costs of travel, food and specialist equipment required to carry out the voluntary work.

Expense claims should not exceed actual expenses incurred. If a volunteer is paid in excess of their expenses, this will be interpreted as payment for work done, and the volunteer's benefit could be affected. The volunteer could be liable to pay tax on this money, and the organisation could fall foul of minimum wage legislation.

It must be reasonable for the organisation not to pay you. If it is found that the organisation should reasonably have been paying you (e.g. they have paid staff performing the same tasks and could afford to pay for you) then your benefit could be reduced by the amount that you should have been paid.

### Notifying the benefits office

Potential volunteers should notify the benefits office where they make their claim before they start voluntary work. The benefits office can stop benefits if they find that a volunteer has started volunteering without sending them the proper notification.

**Note:** if you are claiming Incapacity Benefit / Disability Living Allowance this should NOT trigger an extraordinary fitness for work test. The benefits office should not require a doctor's letter about volunteering.

## Duties of claimant

- Volunteers must tell the office at which they make their claim that they are about to start voluntary work.
- Volunteers claiming Job Seekers Allowance should be actively seeking work as agreed with their personal advisor and contactable if the chance of a job comes up.
- Volunteers claiming Job Seekers Allowance should be available to work within one week or go for an interview within 48 hours.

## Example of Notification of Voluntary Work

Please complete this form and send it to the benefits office(s) where you make your claim before starting your voluntary work. If there is a problem with you doing voluntary work while claiming benefit, a member of the benefits office staff will contact you. Assuming proper notification of voluntary work by you was given; your benefits should not be affected.

Title	
Surname	
First names	
Date of birth	
National Insurance No.	
Address	
1. Please give the name of the body or person you intend to volunteer for:	
2. Is the work being done for a close relative?	
3. What date does the voluntary work begin?	
4. Please describe briefly the work being undertaken:	
5. How many hours / days will be volunteered?	
6. Give details of expenses incurred in respect of voluntary work (e.g. travel):	
7. Please give details of any other work being undertaken (either paid or unpaid):	
Please sign and date here:	

Source:

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# REDUNDANCY PROCEDURES

There have been many changes to employment law and regulations in the last few years. A key area is the freedom or lack of freedom to make an individual redundant.

An employee's employment can be terminated at any time but unless the redundancy is fair an Employment Tribunal may find the employer guilty of unfair dismissal.

The information below sets out the main principles involved concerning the redundancy of employees. This fact sheet is written in an accessible and understandable way but some of the issues may be very complicated. Professional advice should be sought before any action is taken.

## What is Redundancy?

Under the Employment Rights Act 1996, redundancy arises when employees are dismissed because:

- the employer has ceased, or intends to cease to carry on the business for the purposes of which the employee was so employed or
- the employer has ceased, or intends to cease, to carry on the business in the place where the employee was so employed or
- the requirements of the business for employees to carry out work of a particular kind has ceased or diminished or are expected to cease or diminish or
- the requirements of the business for the employees to carry out work of a particular kind, in the place where they were so employed, has ceased or diminished or are expected to cease or diminish.

In other words, the business reasons for redundancy do not relate to an individual but to a position(s) within the business.

## Consultation - Legal Requirements

Employers who propose to dismiss as redundant 20 or more employees at one establishment have a statutory duty to consult representatives of any recognised independent trade union, or if no trade union is recognised, other elected representatives of the affected employees.

### **Consultation should begin in good time and must begin:**

- at least 30 days before the first dismissal takes effect if 20 to 99 employees are to be made redundant at one establishment over a period of 90 days or less
- at least 90 days before the first dismissal takes effect if 100 or more employees are to be made redundant at one establishment over a period of 90 days or less.
- Employers also have a statutory duty to notify the Department of Trade and Industry if they propose to make 20 or more workers redundant at one establishment over a period of 90 days or less.

If an employer fails to consult, a Tribunal has discretion to make a protective award of up to 90 days pay.

It is good practice in all organisations however, regardless of size and number of employees to be dismissed, for employers to consult with employees or their elected representatives at an early enough stage to allow discussion as to whether the proposed redundancies are necessary at all. Then they should ensure that individuals are made aware of the contents of any agreed procedures and of the opportunities available for consultation and for making representations. **It must be remembered that redundancy is a form of dismissal and therefore all employers must follow a disciplinary and dismissal procedure which satisfies the requirements of the Dispute Resolution Regulations 2004, namely to include a letter setting out the reasons for the potential redundancy, a meeting and an appeal process.**

## Disclosure of Information

Employers have a statutory duty to disclose in writing to the appropriate representatives the following information so they can play a constructive part in the consultation process:

- the reasons for the proposals
- the number and descriptions of employees it is proposed to dismiss as redundant
- the total number of employees of any such description employed at the office in question
- the way in which employees will be selected for redundancy
- how the dismissals will be carried out and over what timescale
- the method of calculating the amount of redundancy payments (other than statutory redundancy pay) to be made.

To ensure that employees are not unfairly selected for redundancy, the selection criteria should be objective, fair and consistent. They should be agreed with employee representatives and an appeals procedure should be established.

Examples of such criteria include last in first out (LIFO), attendance record, experience and capability. The chosen criteria should be measurable and consistently applied. Non-compulsory selection criteria include voluntary redundancy and early retirement, although it is sensible to agree management's right to decide whether or not such an application is accepted or not.

Employers should also consider whether employees likely to be affected by redundancy could be offered suitable alternative work within the organisation or any associate company.

Employees who are under notice of redundancy and have been continuously employed for more than two years, qualify for a reasonable amount of paid time off to look for another job or to arrange training.

## Unfair Selection for Redundancy

An employee will be deemed to have been unfairly selected for redundancy for the following reasons:

- participation in trade union activities
- carrying out duties as an employee representative for purposes of consultation on redundancies
- taking part in an election of an employee representative
- taking action on health and safety grounds as a designated or recognised health and safety representative
- asserting a statutory employment right
- by reasons of discrimination
- maternity-related grounds.

# The Right to a Redundancy Payment

Employees who have at least two years' continuous service qualify for a redundancy payment.

The entitlement is as follows:

- For each complete year of service until the age of 21 - half a week's pay
- For each complete year of service between the ages of 22 and 40 inclusive - one week's pay
- For each complete year of service over the ages of 41 - one and a half weeks' pay.

For a person aged over 64 the payment is reduced by one twelfth for each complete month that the employee is aged over 64.

A week's pay is that to which the employee is entitled under his or her terms of contract as at the date the employer gives minimum notice to the employee.

The maximum statutory limit for a week's pay is £310 with effect from 1 February 2007 and the maximum statutory payment is 30 weeks pay or £9,300. This figure is reviewed annually and employers may, of course, pay in excess of the statutory minimum.

The employee is also entitled to a period of notice or payment in lieu of notice by statute and their contract of employment.

## Further redundancy information and help can be obtained from the following:

### **NVCO UK Workforce Hub**

<http://www.ncvo-vol.org.uk>

To contact the help desk phone 0800 652 5737 or

Email: [help@workforcehub.org.uk](mailto:help@workforcehub.org.uk)

### **Interchange Legal Services**

Hampstead Town Hall Centre, 213 Haverstock Hill, London, NW3 4QP

Contact a specialist lawyer on 0207 692 5860 or 0207 813 7493 (fax)

Email: [legal@interchange.org.uk](mailto:legal@interchange.org.uk)

### **LawWorks**

LawWorks is a national charity whose aim is to increase the delivery of voluntary legal services to individuals and communities in need.

10-13 Lovat Lane, London, EC3R 8DN

Tel: 0207 929 5601 or 0207 929 5722 (fax)

Website [www.lawworks.org.uk](http://www.lawworks.org.uk)

### **London Voluntary Sector Council (LVSC)**

Run the Personnel, Employment Advice and Conciliation Service (PEACe). This provides expert advice and guidance on all employment-related issues to London's VCS employers.

Helpline (Tuesday, Wednesday & Friday from 9.30am to 5pm) - 0207 700 8147 Email: [peace@lvsc.org.uk](mailto:peace@lvsc.org.uk)

### **The Advisory, Conciliation and Arbitration Service (ACAS)**

ACAS is an organisation devoted to preventing and resolving employment disputes. Helpline 08457 474747

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Department for Business Enterprise & Regulatory Reform (BERR)

# DATA PROTECTION

The Data Protection Act 1998 governs the use of personal information by businesses and other organisations. If your business requires that you store people's personal details such as customer or employee records, then you must comply with the Act.

The law requires and give advice on how to meet its requirements. It also tells you whether you need to notify the Information Commissioner's Office (ICO) about what you use personal information for and where to do if you need more information.

As a childminding, nursery or day care setting you need to be aware of these rules that govern your business. You can download a brief guide to data protection for small businesses from the ICO website or contact them directly:

Website: [www.ico.gov.uk](http://www.ico.gov.uk)

Helpline: 01625 545745

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# CHILDCARE A BUSINESS ACTIVITY FOR VAT PURPOSES?

## Question

I phoned HMRC but I still need clarification on VAT on capital projects related to childcare, and also where providers are either dual registered (charitable company) or unincorporated charities – what is the situation as regards VAT in capital and revenue projects?

## Answer

Firstly, the corporate status of the charity is immaterial for VAT purposes: the issue is simply whether an organisation is officially recognised as a charity or not.

Regarding childcare facilities and VAT: the policy expressed by HMRC in their **“Business Brief”** of February 2005 still stands. This dealt with a couple of disputes between HMRC (or Customs & Excise, as it then was) and the courts concerning the status of childcare facilities provided by charities. If they were considered as business activities, then they would be “taxable supplies” for VAT purposes. If not, they would be exempt. HMRC thought such facilities should be treated as business activities because “we consider that the charity is making supplies of services for consideration in much the same way as a commercial nursery”.

However, the courts twice rejected this argument, so HMRC announced “Customs will now accept that the provision of nursery and crèche facilities by charities ... is not a business activity for VAT purposes”.

Note, however, that this ruling only applies to situations that are comparable to the two test cases that were settled in court. “In cases that are not broadly in line with St Paul’s or Yarburgh, Customs shall continue to apply the business test, in order to determine whether the supplies concerned are being made by way of business.”

**This release and other information about HM Revenue & Customs can be found at the HMRC website: [www.hmrc.gov.uk](http://www.hmrc.gov.uk).**

### **3. VAT – Supplies of nursery and crèche facilities by a charity**

This Business Brief article is issued to clarify Customs' position on the business status of supplies of nursery and crèche facilities where those supplies are made by a charity. This issue first arose as a result of the High Court case of Yarburgh Children's Trust (see Business Brief 04/03) and has recently been tested again in the High Court case of St Paul's Community Project Ltd.

In the earlier case of Yarburgh, the Court decided that the charity was not making supplies by way of business. Despite that decision, Customs' position remained that the provision of nursery and crèche facilities in such circumstances was a business activity for VAT purposes. However, in the more recent case of St Paul's, the Court's decision has again gone in favour of the charity. The Court found that the intrinsic nature of the enterprise was not the carrying on of a business, identifying the distinguishing features as the social concern for the welfare of disadvantaged children, lack of commerciality in setting fees and the overall intention simply to cover costs.

Customs do not agree that these features point to the activities being non-business because we consider that the charity is making supplies of services for consideration in much the same way as a commercial nursery. However, taking into account all the circumstances in this case, Customs have decided not to appeal further.

This means Customs will now accept that the provision of nursery and crèche facilities by charities, along the same lines as those in Yarburgh Children's Trust and St Paul's Community Project Ltd, is not a business activity for VAT purposes.

## **Background**

Both Yarburgh Children's Trust and St Paul's Community Project Ltd are charities which undertake to provide nursery and crèche facilities for pre-school age children as part of their charitable objectives. Both organisations charge fees for their services, which are set at a level designed to ensure that they merely cover their costs. They both undertook construction of new nursery premises. Such supplies would normally be subject to VAT but there are provisions in UK law which allow construction work to be zero-rated where buildings are used by a charity otherwise than in the course of business. Zero-rating can be beneficial to charities, if they undertake exempt activities and the amount of VAT they recover would be heavily restricted. Customs denied zero-rating on the grounds that these charities were making business supplies. The High Court has taken the opposing view that neither charity is in business for VAT purposes.

## **Customs' policy**

It remains Customs' long standing policy that a business activity is possible even in the absence of a profit motive. Customs believe that this approach is consistent with UK and EC legislation and is supported by a number of decisions of the UK and European Courts. Many charities with activities not motivated by profit and whose fees are subsidised by public funds or donations benefit from such activities being business for VAT purposes, because they are able to recover VAT incurred in relation to those activities. It would not be beneficial for the charity sector as a whole if charitable activities were all regarded as non-business, as it would deny them recovery of input tax. In cases that are not broadly in line with St Paul's or Yarburgh, Customs shall continue to apply the business test, in order to determine whether the supplies concerned are being made by way of business.

# What constitutes a business activity for VAT purposes?

As neither UK nor EC legislation has provided an exhaustive definition or test for determining if an activity is business, the meaning of business and economic activity has emerged from a body of case law. This has given rise to the business test, which consists of six elements or indicators that the Courts have seen as being characteristic of a business. These are not a checklist and a business may have some, but not all, of the features indicated. Instead they are a set of tools designed to help compare activities where there is some uncertainty about their nature with features of activities that are clearly business. In most cases, it will be clear that an activity is business but, where difficulties arise, Customs will apply this business test. The elements of this test were set out in Business Brief 04/03 and are reproduced below.

- **Is the activity a serious undertaking earnestly pursued?** (This considers whether the activity is carried on for business or daily work rather than pleasure or daily enjoyment.)
- **Is the activity an occupation or function that is actively pursued with reasonable or recognisable continuity?** (When considering this test one should consider how frequently the supplies will be made.)
- **Does the activity have a certain measure of substance in terms of the quarterly or annual value of taxable supplies made?**
- **Is the activity conducted in a regular manner and on sound and recognised business principles?**
- **Is the activity predominately concerned with the making of taxable supplies for a consideration?** (This has in many instances been seen as the most important and arguably the most problematic indicator. In the appeal of The Institute of Chartered Accountants England and Wales, the House of Lords found that the test must be read as asking 'what is the real nature of the activity' ie is the real nature of the activity the making of taxable supplies for consideration or is it something else?)
- **Are the taxable supplies that are being made of a kind which, subject to differences of detail, are commonly made by those who seek to profit from them?**

# DIRECTORS' RESPONSIBILITIES

The position of director brings both rewards and responsibilities upon an individual.

Whether you are appointed to the Board of the company you work for or you are involved in establishing a new business and take on the role of director you will feel a sense of achievement.

However the office of director should not be accepted lightly. It carries with it a number of duties and responsibilities. We summarise these complex provisions below.

This is particularly important following the advent of the Companies Act 2006. The Act received Royal Assent on 8 November 2006, and is being introduced in a series of stages. All of the provisions of the Act will be implemented by October 2008\*. The legislation will replace all existing Company Law, except for the provisions relating to company investigations and community interest companies (CICs).

## Companies

**You can undertake business in the UK as either:**

- an unincorporated entity, ie a sole trader or a partnership or
- an incorporated body.

An incorporated business is normally referred to as a company. Although there are limited liability partnerships and unlimited companies the vast majority of companies are limited by shares. This means the liability of shareholders is limited to the value of their share capital (including any unpaid).

A limited company can be a private or public company. A public company must include 'public' or 'plc' in its name and can offer shares to the public.

The responsibilities and penalties are more onerous if you are a director of a public company.

## Directors

When you are appointed a director of a company you become an officer with extensive legal responsibilities. The Companies Act 2006 sets out a new statement of the general duties of directors. This statement codifies the existing 'common law' rules and equitable principles relating to the obligations of company directors. The existing common law had focused on the interests of shareholders. The new law extends this by highlighting the connection between what constitutes the good of the company and a consideration of its wider corporate social responsibilities.

The legislation stipulates that directors must act in the interests of the company and not in the interests of any other parties (including shareholders). Even sole director/shareholder companies must consider the implications by not putting their own interests above those of the company.

The aim of the codification of duties is to make the law more consistent and accessible. It should be noted that other existing duties will continue to apply alongside the new statutory duties.

The Act outlines seven new statutory directors' duties, as detailed below. Four of these took effect on 1 October 2007; the remaining three provisions come into force on 1 October 2008.\*

# New responsibilities from 1 October 2007

## **Duty to act within their powers**

A company director must act only in accordance with the company's constitution, and must only exercise powers for the purposes for which they were conferred.

## **Duty to promote the success of the company**

This duty replaces the previous duty of directors to act 'in good faith and in the best interests of the company'.

A company director must act in such a way that he or she feels would be most likely to promote the success of the company (ie. its long-term increase in value), for the benefit of its members as a whole. However, the director must also consider a number of other factors, including:

- The likely long-term consequences of any decision
- The interests of company employees
- Fostering the company's business relationships with suppliers, customers and others
- The impact of operations on the community and environment
- Maintaining a reputation for high standards of business conduct
- The need to act fairly as between members of the company.

## **Duty to exercise independent judgment**

A director has an obligation to exercise independent judgment. This duty is not infringed by acting in accordance with an agreement entered into by the company which restricts the future exercise of discretion by its directors, or by acting in a way which is authorised by the company's constitution.

## **Duty to exercise reasonable care, skill and diligence**

This duty codifies the common law rule of duty of care and skill, and imposes both 'subjective' and 'objective' standards. A director must exercise reasonable care, skill and diligence using their own general knowledge, skill and experience (subjective), together with the care, skill and diligence which may reasonably be expected of a person who is carrying out the functions of a director (objective). So a director with significant experience must exercise the appropriate level of diligence in executing their duties, in line with their higher level of expertise.

# New responsibilities from 1 October 2008\*

## **Duty to avoid conflicts of interest**

This dictates that a director must avoid a situation in which he or she has, or may have, a direct or indirect interest which conflicts, or could conflict, with the interests of the company.

This duty applies in particular to a transaction entered into between a director and a third party, in relation to the exploitation of any property, information or opportunity. It does not apply to a conflict of interest which arises in relation to a transaction or arrangement with the company itself.

This clarifies the previous conflict of interest provisions, and makes it easier for directors to enter into transactions with third parties by allowing directors not subject to any conflict on the board to authorise them, as long as certain requirements are met.

## **Duty not to accept benefits from third parties**

Building on the established principle that a director must not make a secret profit as a result of being a director, this duty states that a company director must not accept any benefit from a third party (whether monetary or otherwise) which has been conferred because of the fact that he or she is a director, or as a consequence of taking, or not taking, a particular action as a director.

This duty applies unless the acceptance of the benefit cannot reasonably be regarded as likely to give rise to a conflict of interest.

## **Duty to declare interest in a proposed transaction or arrangement**

Again there is an existing requirement for directors to disclose an interest in a proposed transaction. The new duty extends this further and requires that any company director who has either a direct or an indirect interest in a proposed transaction or arrangement with the company must declare the 'nature and extent' of that interest to the other directors, before the company enters into the transaction or arrangement.

The requirement to make a disclosure also applies where directors 'ought reasonably to be aware' of any such conflicting interest.

However, the requirement does not apply where the interest cannot reasonably be regarded as likely to give rise to a conflict of interest, or where other directors are already aware (or 'ought reasonably to be aware') of the interest.

# **Enforcement and Penalties**

Although the common law duties have been extended and incorporated into Company Law, the Act states that they will be enforced in the same way as the common law. As a result there are no penalties in the Companies Act 2006 for failing to undertake the above duties correctly.

Enforcement is via an action against the director for breach of duty. Currently such an action can only be brought by:

- The company itself (ie the Board or the members in general meeting) deciding to commence proceedings; or
- A liquidator when the company is in liquidation.

Where the company is controlled by the directors these actions are unlikely. However the Act has also introduced new legislation whereby an individual shareholder can take action against a director for breach of duty. This is known as a derivative action and can be taken for any act of omission (involving negligence), default or breach of duty or trust.

# **How We Can Help**

You will now be aware that the position of director must not be accepted lightly.

- The law is designed to penalise those who act irresponsibly or incompetently.
- A director who acts honestly and conscientiously should have nothing to fear.

We can provide the professional advice you need to ensure you are in the latter category.

Please come and talk to us if you would like more information.

\*On 7 November 2007 the government announced that a final commencement timetable for the Act will be issued in December 2007 and that many 1 October 2008 provisions will be put back to 1 October 2009.

# DISCIPLINE AT WORK

## The need for rules and disciplinary procedures

### Key Points

- Rules are necessary because they set standards. A good disciplinary procedure helps employees keep the rules, and helps employers deal fairly with those who do not
- Rules will normally cover issues such as absence, timekeeping and holiday arrangements, health and safety, use of the organisation's equipment and facilities, misconduct, sub-standard performance, and discrimination, bullying and harassment
- Rules and procedures should be clear, and should preferably be put in writing. They should be known and understood by all employees
- All employees should have ready access to a copy of the rules and disciplinary procedures
- Management should aim to secure the involvement of employees and any recognised trade union or other employee representatives when rules and disciplinary procedures are introduced or revised
- Rules should be reviewed from time to time and revised if necessary
- Management should ensure that those responsible for operating disciplinary rules understand them and receive appropriate training

## Why have rules?

Clear rules benefit employees and employers. Rules set standards of conduct and performance at work and make clear to employees what is expected of them.

## How should rules be drawn up and communicated?

To be fully effective rules and procedures should be accepted as reasonable by those covered by them and those who operate them. It is therefore good practice to develop rules in consultation with employees (via their representatives if appropriate) and those who will have responsibility for applying them.

Writing down the rules helps both managers and employees to know what is expected of them. The rules should be made clear to employees, and ideally they should be given their own copy.

In a small organisation, it may be sufficient for rules to be displayed in a prominent place. In large organisations, it is good practice to include a section on rules in the organisation's handbook, and to discuss them during the induction programme.

Special attention should be paid to ensure that rules are understood by any employees with little experience of working life (for instance young people or those returning to work after a lengthy break), and by employees whose English or reading ability is limited.

Rules are more readily accepted and adhered to if people understand the reasons for them. For instance, if an employee is required to wear protective clothing, it is sensible to explain if this is for a particular reason e.g. because of corrosive liquids, or staining materials. A uniform may be more acceptable if it is explained that it is so customers or the public can identify employees.

Unless there are valid reasons why different sets of rules apply to different groups of employees – perhaps for health and safety reasons – rules should apply to all employees at all levels in the organisation.

The rules should not discriminate on the grounds of sex, marital status, racial group, sexual orientation, religion or belief, disability or age.

Where a rule has fallen into disuse or has not been applied consistently, employees should always be told before there is any change in practice. Any revisions to the rules should be communicated to all employees, and employees should be issued with a revised written statement within one month of the change.

## What should rules cover?

Employers should be aware that any such requirement must be solely on the basis of health or safety, and should not discriminate between sexes or on the basis of age, race, disability, sexual orientation or religion or belief. While the following is not an exhaustive list, as different organisations will have different requirements, examples of the types of issues that rules might cover are:

### **Timekeeping**

- 'clock-in' times
- lateness.

### **Absence**

- authorising absence
- approval of holidays
- notification of absence
  1. who the employee tells
  2. when they tell them
  3. the reasons for absence
  4. likely time of arrival/return
- rules on self-certification and doctor's certificates.

### **Health and safety**

- personal appearance – any special requirements regarding, for example, protective clothing, hygiene or the wearing of jewellery.

Employers should be aware that any such requirement must be solely on the basis of health or safety, and should not discriminate between sexes or on the basis of race, disability, sexual orientation or religion or belief

- smoking policy
- special hazards/machinery/chemicals
- policies on alcohol, drug or other substance abuse.

### **Use of organisation facilities**

- private telephone calls
- computers, email and the internet
- company premises outside working hours
- equipment.

### **Discrimination, bullying and harassment**

- equal opportunities policy
- policy on harassment relating to race, sex, disability, sexual orientation, religion or belief
- bullying and harassment policy
- non-discriminatory clothing or uniform policies
- any standards of written or spoken language needed for the safe and effective performance of the job.

### **Gross misconduct**

- the types of conduct that might be considered as 'gross misconduct' (this is misconduct that is so serious that it may justify dismissal without notice).

## **Why have a disciplinary procedure?**

A disciplinary procedure is the means by which rules are observed and standards are maintained. It provides a method of dealing with any shortcomings in conduct or performance and can help an employee to become effective again. The procedure should be fair, effective, and consistently applied.

## **What should disciplinary procedures contain?**

When drawing up and applying procedures, employers should always bear in mind the requirements of natural justice. For example, employees should be informed of the allegations against them, together with the supporting evidence, in advance of the meeting. Employees should be given the opportunity to challenge the allegations before decisions are reached and should be provided with a right to appeal.

### **Good disciplinary procedures should:**

- be put in writing
- say who they apply to (if there are different rules for different groups)
- be non-discriminatory
- provide for matters to be dealt with speedily
- allow for information to be kept confidential
- tell employees what disciplinary action might be taken
- say what levels of management have the authority to take the various forms of disciplinary action
- require employees to be informed of the complaints against them and supporting evidence, before any meeting
- give employees a chance to have their say before management reaches a decision
- provide employees with the right to be accompanied
- provide that no employee is dismissed for a first breach of discipline, except in cases of gross misconduct
- require management to investigate fully before any disciplinary action is taken
- ensure that employees are given an explanation for any sanction and allow employees to appeal against a decision.

### **The procedures should also:**

- apply to all employees, irrespective of their length of service, status or number of hours worked
- ensure that any investigatory period of suspension is with pay, and specify how pay is to be calculated during such period. If, exceptionally, suspension is to be without pay, this must be provided for in the contract of employment
- ensure that any suspension is brief, and is never used as a sanction against the employee prior to a disciplinary meeting and decision
- ensure that the employee will be heard in good faith and that there is no pre-judgement of the issue
- ensure that, where the facts are in dispute, no disciplinary penalty is imposed until the case has been carefully investigated, and there is a reasonably held belief that the employee committed the act in question.

## **Training**

Those responsible for using and operating the disciplinary rules and procedures should be trained for the task. Ignoring or circumventing the procedures when dismissing an employee is likely to have a bearing on the outcome of any subsequent tribunal complaint. Good training helps managers achieve positive outcomes, reducing the need for any further disciplinary action. If the organisation recognises trade unions, or there is any other form of employee representation, it can be useful to undertake training on a joint basis – everyone then has the same understanding and has an opportunity to work through the procedure, clarifying any issues that might arise.

Source  
Arbitration and Conciliation Service (ACAS)



# HANDLING DISCIPLINE

## Encourage improvement

The main purpose of operating a disciplinary procedure is to encourage improvement in an employee whose conduct or performance are below acceptable standards.

## Act promptly

Problems dealt with early enough can be 'nipped in the bud', whereas delay can make things worse as the employee may not realise that they are below standard unless they are told. Arrange to speak to the employee as soon as possible – the matter may then be able to be dealt with in an informal manner and not as part of the disciplinary process.

## Gather the facts

By acting promptly the relevant supervisor or manager can clarify what the problem is and gather information before memories fade, including anything the employee has to say. Where necessary, statements should be obtained from witnesses at the earliest opportunity. Keep records of what is said – copies may need to be given to the individual if the matter progresses any further. Relevant personal details such as previous performance, length of service and any current warnings will need to be obtained before the meeting, as well as any appropriate records and documents.

## Be firm and fair

Whilst maintaining satisfactory standards and dealing with disciplinary issues requires firmness on the part of the manager, it also requires fairness. Be as objective as possible, keep an open mind, and do not prejudge the issues.

## Suspension with pay

Where there appears to be serious misconduct, or risk to property or other people, a period of suspension with pay should be considered while the case is being investigated. This allows tempers to cool and hasty action to be avoided. Any suspension must be with pay unless the contract of employment allows suspension without pay, and any period of suspension should be as short as possible. Tell the employee exactly why they are being suspended, and that they will be called in for a disciplinary meeting as soon as possible. Do not use suspension as a sanction before the disciplinary meeting and decision and treat employees fairly and consistently.

## Stay calm

Conduct enquiries, investigations and proceedings with thought and care. Avoid snap decisions, or actions in the heat of the moment. The disciplining of a worker is a serious matter and should never be regarded lightly or dealt with casually.

## Be consistent

The attitude and conduct of employees may be seriously affected if management fails to apply the same rules and considerations to each case. Try to ensure that all employees are aware of the organisation's normal practice for dealing with misconduct or unsatisfactory performance.

## Consider each case on its merits

While consistency is important, it is also essential to take account of the circumstances and people involved. Personal details such as length of service, past disciplinary history and any current warnings will be relevant to such considerations. Any provocation or other mitigation also needs to be taken into account. Any decision to discipline an employee must be reasonable in all the circumstances and must not discriminate on grounds of age, race, sex, disability, sexual orientation or religion or belief.

## Follow the disciplinary procedure

The disciplinary procedure must be followed and the supervisor or manager should never exceed the limits of his or her authority.

If the employee is dismissed or suffers a disciplinary penalty short of dismissal – such as suspension without pay – the statutory minimum procedures must have been followed. If they have not been followed and the employee makes a claim to an employment tribunal the dismissal will automatically be ruled unfair. To make a claim to an employment tribunal, employees will ordinarily have to have one year's service.

## Is disciplinary action necessary?

**Having gathered all the facts, the manager or supervisor should decide whether to:**

- drop the matter – there may be no case to answer or the matter may be regarded as trivial
- arrange counselling/take informal action – this is an attempt to correct a situation and prevent it from getting worse without using the disciplinary procedure.
- consider using an independent mediator. A mediator won't take sides or judge who is right but can help the parties reach their own agreement where the employer and employee are unable to solve a disagreement alone. The mediator may also recommend a way forward if both parties agree that they want this.
- arrange a disciplinary meeting – this will be necessary when the matter is considered serious enough to require disciplinary action.

Employment Tribunals expect employers to behave fairly and reasonably.

## Core principles of reasonable behaviour

- Use procedures primarily to help and encourage employees to improve rather than just as a way of imposing a punishment.
- Inform the employee of the complaint against them, and provide them with an opportunity to state their case before decisions are reached.
- Allow employees to be accompanied at disciplinary meetings.
- Make sure that disciplinary action is not taken until the facts of the case have been established and that the action is reasonable in the circumstances.
- Never dismiss an employee for a first disciplinary offence, unless it is a case of gross misconduct.
- Give the employee a written explanation for any disciplinary action taken and make sure they know what improvement is expected.
- Give the employee an opportunity to appeal.
- Deal with issues as thoroughly and promptly as possible.
- Act consistently.

Source

Arbitration and Conciliation Service (ACAS)



# DISCIPLINARY OPTIONS

## The Disciplinary Meeting

### Investigating cases

When investigating a disciplinary matter take care to deal with the employee in a fair and reasonable manner. Where it is necessary to hold an investigatory meeting give the employee advance warning of the meeting and time to prepare. Exceptionally, where you have reasonable grounds for concern that evidence may be tampered with or destroyed before the meeting, consider suspending the employee with pay for a brief period whilst the investigation is carried out.

Any investigatory meeting should be conducted by a management representative and should be confined to establishing the facts of the case. If at any stage it becomes apparent that formal disciplinary action may be needed then the interview should be terminated and a formal hearing convened at which the employee will have the right to be accompanied.

### Preparing for the meeting

- ensure that all the relevant facts are available, such as disciplinary records and any other relevant documents (for instance absence or sickness records) and, where appropriate, written statements from witnesses
- tell the employee of the complaint, the procedure to be followed, and that he or she is required to attend a disciplinary meeting
- tell the employee that he or she is entitled to be accompanied at the meeting.
- arrange for a second member of management to be present wherever possible
- check if there are any special circumstances to be taken into account. For example, are there personal or other outside issues affecting performance or conduct?
- be careful when dealing with evidence from an informant who wishes to remain anonymous. Take written statements, seek corroborative evidence and check that the informant's motives are genuine.
- are the standards of other employees acceptable, or is this employee being unfairly singled out?
- consider what explanations may be offered by the employee, and if possible check them out beforehand
- allow the employee time to prepare his or her case. It may be useful and save time at the meeting if copies of any relevant papers and witness statements are made available to the employee in advance
- if the employee concerned is a trade union official discuss the case with a trade union representative or full-time official after obtaining the employee's agreement. This is because the action may be seen as an attack on the union
- arrange a time for the meeting, which should be held as privately as possible, in a suitable room, and where there will be no interruptions. The employee may offer a reasonable alternative date if their chosen companion cannot attend
- if an employee fails to attend a meeting through circumstances outside their control, such as illness, the employer must arrange another meeting
- establish what disciplinary action was taken in similar circumstances in the past
- where possible arrange for a second member of management to take notes of the proceedings and act as a witness
- if a witness is someone from outside the organisation who is not prepared or is unable to attend the meeting try and get a written statement from him or her
- allow the employee to call witnesses or submit witness statements
- if there may be understanding or language difficulties consider the provision of an interpreter or facilitator (perhaps a friend of the employee, or a co-employee)
- think about the structure of the meeting and make a list of points you will wish to cover.

# How should the disciplinary meeting be conducted?

Meetings rarely proceed in neat, orderly stages but the following guidelines may be helpful:

- introduce those present to the employee and explain why they are there
- introduce and explain the role of the accompanying person if present
- explain that the purpose of the meeting is to consider whether disciplinary action should be taken in accordance with the organisation's disciplinary procedure
- explain how the meeting will be conducted.

## Statement of the complaint

- state precisely what the complaint is and outline the case briefly by going through the evidence that has been gathered. Ensure that the employee and his or her representative or accompanying person are allowed to see any statements made by witnesses
- remember that the point of the meeting is to establish the facts, not catch people out. Establish whether the employee is prepared to accept that he/she may have done something wrong. Then agree the steps which should be taken to remedy the situation.

## Employee's reply

- give the employee the opportunity to state his/her case and answer any allegations that have been made. He/she should be able to ask questions, present evidence and call witnesses. The accompanying person may also ask questions and should be able to confer privately with the employee. Listen carefully and be prepared to wait in silence for an answer as this can be a constructive way of encouraging the employee to be more forthcoming
- if it is not practical for witnesses to attend, consider proceeding if it is clear that their evidence will not affect the substance of the complaint
- if a grievance is raised during the meeting that relates to the case it may be appropriate to suspend the disciplinary procedure for a short period until the grievance can be considered.

## General questioning and discussion use this stage to establish all the facts

- adjourn the meeting if further investigation is necessary, or, if appropriate, at the request of the employee or his or her accompanying person
- ask the employee if she or he has any explanation for the misconduct or failure to improve, or if there are any special circumstances to be taken into account
- if it becomes clear during this stage that the employee has provided an adequate explanation or there is no real evidence to support the allegation, stop the proceedings
- keep the approach formal and polite and encourage the employee to speak freely with a view to establishing the facts. A properly conducted disciplinary meeting should be a two-way process. Use questions to clarify the issues and to check that what has been said is understood. Ask open-ended questions, for example, 'what happened then?' to get the broad picture. Ask precise, closed questions requiring a yes/no answer only when specific information is needed
- do not get involved in arguments and do not make personal or humiliating remarks. Avoid physical contact or gestures which could be misinterpreted or misconstrued as judgemental.

## Summing up

Summarise the main points of the discussion after questioning is completed. This allows all parties to be reminded of the nature of the offence, the arguments and evidence put forward and to ensure nothing is missed. Ask the employee if he/she feels that they have had a fair hearing, and whether they have anything further to say. This should help to demonstrate to the employee that they have been treated reasonably.

## Adjournment

It is generally good practice to adjourn before a decision is taken about whether a disciplinary penalty is appropriate. This allows time for reflection and proper consideration. It also allows for any further checking of any matters raised, particularly if there is any dispute over facts. If new facts emerge, consider whether to reconvene the disciplinary meeting.

## What problems may arise and how should they be handled?

It is possible that the disciplinary meeting may not proceed very smoothly – people may be upset or even angry. If the employee becomes upset or distressed allow time for them to regain composure before continuing. If the distress is too great to continue then adjourn and reconvene at a later date – however, the issues should not be avoided. Clearly during the meeting there may be some ‘letting off steam’, and this can be helpful in finding out what has actually happened. However, abusive language or conduct should not be tolerated.

## Taking Action

### Key Points

- The decisions that are made at the end of a disciplinary meeting are whether to take disciplinary action, if so what, and whether any other action should be taken (for example, training or job change)
- Before deciding whether a disciplinary penalty is appropriate, and at what level, consider the employee’s disciplinary and general record, whether the organisation’s rules point to the likely penalty, action taken in previous cases, any explanations and circumstances to be considered and whether the penalty is reasonable
- Leave the employee in no doubt as to the nature of the disciplinary penalty, the improvement expected and the need to sustain the improvement
- Give the employee written details of any disciplinary action
- Keep records of disciplinary action secure and confidential. Give a copy of the record to the employee concerned
- Do not allow disciplinary action to count against an individual indefinitely except in exceptional cases – such as where misconduct verges on gross misconduct

Source  
Arbitration and Conciliation Service (ACAS)

# DISCIPLINE IN PRACTICE – EXAMPLES

## What should be considered before deciding any disciplinary penalty?

When deciding whether a disciplinary penalty is appropriate and what form it should take, consideration should be given to:

- whether the rules of the organisation indicate what the likely penalty will be as a result of the particular misconduct
- the penalty imposed in similar cases in the past
- the employee's disciplinary record, general work record, work experience, position and length of service
- any special circumstances which might make it appropriate to adjust the severity of the penalty
- whether the proposed penalty is reasonable in view of all the circumstances.

It should be clear what the normal organisational practice is for dealing with the kind of misconduct or unsatisfactory performance under consideration. This does not mean that similar offences will always call for the same disciplinary action: each case must be looked at on its own merits and any relevant circumstances taken into account. Such relevant circumstances may include health or domestic problems, provocation, ignorance of the rule or standard involved or inconsistent treatment in the past. Take the opportunity to review rules and procedures and the organisation's communications with employees. Look at consistency of process and investigation rather than just at outcomes.

If guidance is needed on formal disciplinary action, seek advice, where possible, from someone who will not be involved in hearing any potential appeal.

## Discipline in practice – example 2

A member of the accounts staff makes a number of mistakes on invoices to customers. You bring the mistakes to his attention, make sure he has had the right training and impress on him the need for accuracy but the mistakes continue.

You invite the employee to a disciplinary meeting and inform him of his right to be accompanied by a colleague or employee representative. At the meeting the employee does not give a satisfactory explanation for the mistakes so you decide to issue an improvement note setting out: the problem, the improvement required, the timescale for improvement, the support available and a review date. You inform the employee that a failure to improve may lead to a final written warning.

## Imposing the disciplinary penalty

### First formal action – unsatisfactory performance

**In cases of unsatisfactory performance an employee should be given an 'improvement note', setting out:**

- the performance problem
- the improvement that is required
- the timescale for achieving this improvement
- a review date and
- any support the employer will provide to assist the employee.

The employee should be informed that the note represents the first stage of a formal procedure and that failure to improve could lead to a final written warning and, ultimately, dismissal. A copy of the note should be kept and used as the basis for monitoring and reviewing performance over a specified period (e.g., six months).

However, if an employee's unsatisfactory performance –or its continuance – is sufficiently serious, for example because it is having, or is likely to have, a serious harmful effect on the organisation, it may be justifiable to move directly to a final written warning.

### **First formal action – misconduct**

In cases of misconduct, employees should be given a written warning setting out the nature of the misconduct and the change in behaviour required.

The warning should also inform the employee that a final written warning may be considered if misconduct is repeated. A record of the warning should be kept, but it should be disregarded for disciplinary purposes after a specified period (e.g., six months).

## **Discipline in practice – example 3**

An employee in a small firm makes a series of mistakes in letters to one of your key customers promising impossible delivery dates. The customer is upset at your firm's failure to meet delivery dates and threatens to take his business elsewhere.

You are the owner of the business and carry out an investigation and invite the employee to a disciplinary meeting. You inform her of her right to be accompanied by a colleague or employee representative.

### **Example outcome of meeting**

At the meeting the employee does not give a satisfactory explanation for the mistakes and admits that her training covered the importance of agreeing realistic delivery dates with her manager. During your investigation, her team leader and section manager told you they had stressed to the employee the importance of agreeing delivery dates with them before informing the customer. In view of the seriousness of the mistakes and the possible impact on the business, you issue the employee with a final written warning. You inform the employee that failure to improve will lead to dismissal and of her right to appeal.

### **Example outcome of meeting in different circumstances**

At the meeting, the employee reveals that her team leader would not let her attend training as the section was too busy. Subsequently the team leader was absent sick and the employee asked the section manager for help with setting delivery dates. The manager said he was too busy and told the employee to 'use her initiative'. Your other investigations support the employee's explanation. You inform the employee that you will not be taking disciplinary action and will make arrangements for her to be properly trained. You decide to carry out a review of general management standards on supervision and training.

### **Final written warning**

If the employee has a current warning about conduct or performance then further misconduct or unsatisfactory performance (whichever is relevant) may warrant a final written warning. This may also be the case where 'first offence' misconduct is sufficiently serious, but would not justify dismissal. Such a warning should normally remain current for a specified period, for example, 12 months, and contain a statement that further misconduct or unsatisfactory performance may lead to dismissal.

## Discipline in practice – example 4

A member of your telephone sales team has been to lunch to celebrate success in an exam. He returns from lunch in a very merry mood, is slurring his speech and is evidently not fit to carry out his duties. You decide to send him home and invite him in writing to a disciplinary meeting the following day setting out his alleged behaviour of gross misconduct for which he could be dismissed. Your letter includes information about his right to be accompanied by a colleague or employee representative.

At the meeting he admits he had too much to drink, is very apologetic and promises that such a thing will not happen again. He is one of your most valued members of staff and has an exemplary record over his 10 years service with you. You know that being unfit for work because of excessive alcohol is listed in your company rules as gross misconduct. In view of the circumstances and the employee's record, however, you decide not to dismiss him but give him a final written warning. You inform the employee of his right to appeal.

Source

Arbitration and Conciliation Service (ACAS)



# DISMISSAL PROCEDURES

## Dismissal or other sanction

If the employee has received a final written warning further misconduct or unsatisfactory performance may warrant dismissal. Alternatively the contract may allow for a different disciplinary penalty instead. Such a penalty may include disciplinary transfer, disciplinary suspension without pay, demotion, loss of seniority or loss of increment. These sanctions may only be applied if allowed for in the employee's contract.

### Note

Employers must have followed the minimum statutory dismissal and disciplinary procedures if they wish to dismiss an employee. The procedures – also apply to sanctions such as demotion, loss of seniority or loss of pay.

Any penalty should be confirmed in writing, and the procedure and time limits for appeal set out clearly.

There may be occasions when, depending on the seriousness of the misconduct involved, it will be appropriate to consider dismissal without notice (see below).

## Dismissal with notice

Employees should only be dismissed if, despite warnings, conduct or performance does not improve to the required level within the specified time period. Dismissal must be reasonable in all the circumstances of the case.

Unless the employee is being dismissed for reasons of gross misconduct, he or she should receive the appropriate period of notice or payment in lieu of notice. Such payment should include payments to cover pension contributions and holiday pay as well as the value of any non-cash benefits such as a company car, medical insurance, and any commission which the employee might otherwise have earned. Minimum periods of notice are laid down by law. Employees are entitled to at least one week's notice if they have worked for a month but less than two years. This increases by one week (up to a maximum of 12) for each completed year of service. If the contract of employment gives the right to more notice than the statutory minima then the longer period of notice applies.

## Dismissal without notice

Employers should give all employees a clear indication of the type of misconduct which, in the light of the requirements of the employer's business, will warrant dismissal without the normal period of notice or pay in lieu of notice. So far as possible the types of offences which fall into this category of 'gross misconduct' should be clearly specified in the rules, although such a list cannot normally be exhaustive.

No dismissal should be instant. A dismissal for gross misconduct should only take place after the normal investigation and disciplinary meeting to establish all the facts. The employee should be told of the complaint and be given the opportunity to state his or her case as in any other disciplinary meeting. The employee has the right to be accompanied at any such meeting (see Section 3 of the Code of Practice).

Gross misconduct is generally seen as misconduct serious enough to destroy the contract between the employer and the employee, making any further working relationship and trust impossible. It is normally restricted to very serious offences, for example physical violence, theft or fraud, but may be determined by the nature of the business or other circumstances (see also paragraph 57 of the Code of Practice). The full three-step standard statutory procedure should be used before deciding whether to dismiss – although, in very exceptional circumstances, employers may use the modified statutory procedure (see Annex B of the Code of Practice).

## How should the employee be informed of the disciplinary decision?

The employee should be informed as soon as possible of the decision in all cases. The employee should be told the reasons for the decision, including the results of any further investigations, and left in no doubt as to what action is being taken under the disciplinary procedure. The period that any warning is to remain in force must be clearly stated, and the possible consequences of any further misconduct or continuing unsatisfactory performance. The employee must understand what improvement is required, over what period and how it will be assessed.

Details of any disciplinary action should be given in writing to the employee as soon as the decision is made. A copy of the notification should be retained by the employer. The written notification should specify:

- the nature of the misconduct
- any period of time given for improvement and the improvement expected
- the disciplinary penalty and, where appropriate, how long it will last
- the likely consequences of further misconduct
- the timescale for lodging an appeal and how it should be made.

The organisation may wish to require the employee to acknowledge receipt of the written notification.

## Written reasons for dismissal

Employees with one year's service or more have the right to request a 'written statement of reasons for dismissal'. Employers are required by law to comply within 14 days of the request being made, unless it is not reasonably practicable.

A woman who is dismissed during pregnancy or maternity leave is automatically entitled to the written statement without having to request it and irrespective of length of service. The written statement can be used in evidence in any subsequent proceedings, for example, in relation to a complaint of unfair dismissal.

## What records should be kept?

Consistent handling of disciplinary matters will be difficult unless simple records of earlier decisions are kept. These records should be confidential, detailing the nature of any breach of disciplinary rules, the action taken and the reasons for it, the date action was taken, whether an appeal was lodged, its outcome and any subsequent developments. The Data Protection Act 1998 governs the keeping of manual and computer records, and allows the 'data subjects' access to personal and personnel records about them. The Information Commissioner has produced Codes of Practice covering recruitment and selection, employment records, monitoring at work and information about an employee's health.

In each particular case copies of the relevant records should be given to the employee concerned without him or her needing to request them, although in certain circumstances some information may be withheld, for example to protect a witness.

## Time limits for warnings

Except in agreed special circumstances, any disciplinary action taken should be disregarded for disciplinary purposes after a specified period of satisfactory conduct or performance. This period should be established clearly when the disciplinary procedure is being drawn up. Normal practice is for different periods for different types of warnings. For example, a first written warning might be valid for up to six months while a final written warning may remain in force for 12 months (or more in exceptional circumstances). Warnings should cease to be 'live' following the specified period of satisfactory conduct and should thus be disregarded for future disciplinary purposes.

There may be occasions where an employee's conduct is satisfactory throughout the period the warning is in force, only to lapse very soon thereafter. Where a pattern emerges and there is evidence of abuse, the employee's disciplinary record should be borne in mind in deciding how long any warning should last.

Exceptionally there may be circumstances where the misconduct is so serious – verging on gross misconduct – that it cannot be realistically ignored for future disciplinary purposes. In such circumstances, it should be made very clear that the final written warning can never be removed and that any recurrence of serious misconduct will lead to dismissal. Such instances should be very rare, as it is not good employment practice to keep someone permanently under threat of dismissal.

## Appeals

### Key points

- Provide for appeals to be dealt with speedily
- Wherever possible use a procedure which is different from the general grievance procedure
- Wherever possible provide for the appeal to be heard by someone with higher authority than the person who took the original disciplinary decision
- Pay particular attention to any new evidence introduced at the appeal meeting and allow the employee to comment on it
- Examine the issues fully and do not be afraid to overturn a poor decision

The opportunity to appeal against a disciplinary decision is essential to natural justice, and appeals may be raised by employees on various grounds, for instance new evidence, undue severity or inconsistency of the penalty. Defects in the original disciplinary procedure may often be remedied through a properly held appeal. An appeal must never be used as an opportunity to punish the employee for appealing the original decision, and good practice is that it should not result in any increase in penalty as this may deter individuals from appealing.

## What should an appeals procedure contain?

### It should:

- specify a time-limit within which the appeal should be lodged (the Code recommends five working days as usually appropriate)
- provide for appeals to be dealt with speedily, particularly those involving suspension or dismissal
- wherever possible provide for the appeal to be heard by someone senior in authority to the person who took the disciplinary decision and, if possible, who was not involved in the original meeting or decision
- spell out what action may be taken by those hearing the appeal
- set out the right to be accompanied at any appeal meeting
- provide that the employee, or a companion if the employee so wishes, has an opportunity to comment on any new evidence arising during the appeal before any decision is taken.

## Small firms

In small firms, it may not be possible to find someone with higher authority than the person who took the original disciplinary decision. If this is the case, that person should act as impartially as possible when hearing the appeal, and should use the meeting as an opportunity to review the original decision.

## How should an appeal hearing be conducted?

Before the appeal ensure that the individual knows when and where it is to be held, and of their statutory right to be accompanied (see Section 3 of the Code of Practice. Make sure the relevant records and notes of the original meeting are available for all concerned.

### At the meeting

- introduce those present to each other, explaining their presence as necessary
- explain the purpose of the meeting, how it will be conducted, and the powers the person/people hearing the appeal have
- ask the employee why he or she is appealing against the discipline
- pay particular attention to any new evidence that has been introduced, and ensure the employee has the opportunity to comment on it
- once the relevant issues have been thoroughly explored, summarise the facts and call an adjournment to consider the decision
- do not be afraid to overturn a previous decision if it becomes apparent that it was not soundly based – such action does not undermine authority but rather makes clear the independent nature of the appeal. If the decision is overturned does this mean training for managers needs to be improved, do rules need clarification, or are there other implications to be considered?
- inform the employee of the results of the appeal and the reasons for the decision and confirm it in writing. Make it clear, if this is the case, that this decision is final.

## Employment tribunal time limits

Employees who feel they have been unfairly dismissed (and meet the qualifying conditions) or wish to claim compensation within the prescribed limit for being dismissed in breach of contract, have a legal right to make a complaint to an employment tribunal. Such complaints must normally be received by the tribunal within three months counting from and including the individual's last day of employment. A breach of contract claim of wrongful dismissal may alternatively be made in a county court or the High Court, in which case the time limit is six years from the termination of employment (five years in Scotland).

In most cases, internal appeal decisions are reached well within this time frame, but exceptional cases, or appeals to external bodies such as independent arbitrators, may take longer to be heard. If the disciplinary process is in progress then employment tribunals have discretion to extend the time limit for presenting a case in the light of all the circumstances.

Source  
Arbitration and Conciliation Service (ACAS)

# MANAGING UNDER PERFORMANCE OF AN EMPLOYEE

Managing the under performance of an employee can be a very difficult situation not only for the organisation but also for the individual involved.

We have looked at the area of disciplinary procedures and how to work with an underperforming employee by providing them with the necessary support that they require such as flexible working, training, mentoring etc in the previous business fact sheets, which also looked at redundancy matters.

This fact sheet is covering the area of despite having undertaken the above procedures; the individual's work is still incompetent and is having a detrimental affect on the organisation's finances and or the services that the organisation undertakes.

As an organisation there is an option that you could undertake. This would involve the organisation approaching the employee concerned with a package of support to allow someone else to be recruited in their place.

This is known as a 'severance agreement' or 'compromise agreement', in which the organisation comes to an understanding of a package of benefits to pay to someone as they leave, in return for which they agree not to pursue you through a tribunal in respect of any employment rights they have agreed to waive. A suggested financial package could be 3 months salary. This is done in writing and in all causes would involve the use of an employment lawyer or solicitor to draw up the signed agreement and to give you the necessary advice that is required.

The 'severance agreement' or 'compromise agreement' is possible, but would normally be invoked at a later stage in a disagreement about ability to do the job - and perhaps in less clear cut cases of incompetence.

As an organisation if you know that the employee does not merit a pay-off and they need to be dismissed, then you have the right, once the evidence and the tools (the disciplinary process) are in place to do this.

Some organisations prefer to effectively say "look, this is not working out; I intend to start the formal disciplinary process in view of your continued inability to do this job properly, but how about you leaving and us settling this amicably and quickly".

Please bear in mind that this **is fraught with dangers at this stage**, and could even lead to a resignation followed by a claim for constructive dismissal (compelling someone to leave, without due process). Also, apart from anything else, if you have an incompetent employee that is risking your business, the disciplinary process will actually be quicker than protracted negotiations which will by necessity involve a solicitor.

If an employee is clearly jeopardising your organisation's operations and you have evidence of this, you should take the proverbial bull by the horns and start the disciplinary process. If your trustees/management committee or senior managers are satisfied that the employee is incompetent and a danger to the business, and has been given every opportunity to improve, dismissal will be the sanction. An appeal is unlikely to succeed if you have followed due process and evidenced it all.

If you want to go down the 'severance agreement' or 'compromise agreement' route, you definitely need to talk to an employment lawyer before mentioning a compromise agreement. You should start the disciplinary process anyway in the meantime. Start it as soon as possible and progress it as quickly as the procedure allows. Be frank and firm, but fair.

An example of a FAQ about compromise agreements can be found at [www.compromiseagreement.org.uk](http://www.compromiseagreement.org.uk)

There is no easy way to dismiss someone, but addressing these issues is what the disciplinary process is for.

# DISSOLVING A CHARITY / COMPANY

This business fact sheet is looking at some of the areas that a charity or organisation needs to take into account if it is looking to dissolve the organisation.

Before applying for a striking off (removal), it is essential to ensure that all the Company's affairs have been settled: debts paid, assets disposed of, and bank accounts closed. This is the advice given by Companies House:-

## “What should I do before applying?”

There are safeguards for those who are likely to be affected by a Company's dissolution. If your company has creditors, members etc, you are advised to warn all [such] people before applying, as any of them may object to the company being struck off. Any loose ends – such as closing the Company's bank account, the transfer of any domain names – should be dealt with before you apply.

It is also advisable to notify any other organisation or party who may have an interest in the company's affairs, otherwise they might later object to the application. Examples include local authorities, especially if the company is under any obligation involving planning permission or health and safety issues, learning and skills councils and government agencies.

From the date of dissolution, any assets held by a dissolved company will belong to the Crown. The company's bank account will be frozen and any credit balance in the account will be passed to the Crown.

Consequently although a company must be dormant in the sense that it has ceased to carry on its normal activities or business, it can still be active to the extent that it is selling off assets and settling its affairs.

Once the three month period has been completed and all assets disposed of etc, a form 652a is completed and submitted to Companies House with the £10 fee.

Companies House guidance continues:

## “Who must I inform?”

Within seven days after sending Form 652a to the Registrar, you must provide copies of the form to the following:

- members;
- creditors including all contingent (existing) and prospective (likely) creditors such as banks, suppliers, former employees if they are owed money by the company, landlords, tenants (for example, where a bond is refundable), guarantors and personal injury claimants. Also, you must notify appropriate offices of the Inland Revenue, DWP and HMRC if there are outstanding, contingent or prospective liabilities;
- employees;
- managers or trustees of any employee pension fund; and
- Any directors who have not signed the form.

Anyone who becomes a member, creditor etc, after the application must also be sent a copy of the form within seven days of doing so.

You'll find the full text of Companies House guidance at:  
[www.companieshouse.gov.uk/about/gbhtml/gbw2.shtml](http://www.companieshouse.gov.uk/about/gbhtml/gbw2.shtml)

Naturally the Charity Commission must also be informed when the company is dissolved. It is best if you inform them that the process is commencing and ensure they are happy with what you are doing and how you are doing it.

## Non-charitable unincorporated associations

### (A) Process

A starting point is to look at the governing document (constitution) and see if there is a dissolution procedure specified – typically, it will require a decision approved by the votes of a certain proportion of the members.

If so, this process must be followed and the dissolution clause will inevitably specify what should happen with any residual assets (give them to another organisation with similar aims or to charity, etc). Any funds that have been received for a specific purpose should be disposed of in some way that furthers that same purpose. However, if there is no direction given in the dissolution clause and the funds have no specified purpose, they can be distributed amongst the members.

An association can also dissolve spontaneously simply by ceasing to be active. The association is a very loose form of organisation, really just a group of individuals acting together under a common name, so if they stop doing anything together their association is terminated.

### (B) Implications

If the association is solvent when it winds up, all well and good. If it is insolvent, however, the association's debts become the personal debts of the members of the governing body (management committee or what have you). Those liable may include ex-members of the management committee if they were in post when a particular debt was incurred.

## Disposal of assets:

The trustees should easily find another charity that is willing to inherit the company that is being dissolved assets. A local infrastructure organisation, such as a CVS, should be able to broker a suitable deal. Failing that, ask the Charity Commission for help. Their job is to ensure that charitable assets are properly applied so they have a proper interest in helping decide where residual assets should go.

## Document retention periods:

You will find a useful guide to these on the NCVO website:  
[www.ncvo-vol.org.uk/askncvo/legal/index.asp?id=108](http://www.ncvo-vol.org.uk/askncvo/legal/index.asp?id=108)

Source

Experts Online







**If you would like more information about what this factsheet contains in large print or for copies of this factsheet please contact - details below.**

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